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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DAWN WEAVER

Plaintiff,

vs.

TAMAR DAVIS LARSEN and ARAN  
EISENSTAT, on behalf of themselves and  
all others situated, TRADER JOE's  
COMPANY, a California Corporation,

Defendants.

Case No. '14CV1565 GPC WVG

USDC CAND Case No. 11-CV-05188  
(WHO)

**NOTICE OF MOTION AND MOTION  
TO QUASH DEPOSITION SUBPOENA  
OF DAWN WEAVER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date:  
Time:  
Place:  
Judge:

**TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on \_\_\_\_\_, 2014, at the United States District Court for the Southern District of California located at 221 West Broadway, San Diego, California, unnamed class member DAWN WEAVER will and hereby does move the Court for an Order quashing her deposition subpoena.

This motion is based upon violations of Federal Rules of Procedure 45, 23 and 26 because the subpoena seeks to discovery irrelevant material, and is calculated to burdensome and harassing to class counsel's own client, an unnamed class member.

1 This motion is supported by the attached memorandum of points and authorities,  
2 upon the pleadings and records herein, and upon such other and further evidence as may  
3 be adduced at the hearing of this matter.

4  
5 LAW OFFICES OF DARRELL PALMER PC

6  
7 Dated: June 27, 2014

8 By: /s/ Joseph Darrell Palmer  
9 Joseph Darrell Palmer

10 Attorney for Objector Dawn Weaver  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

This case has settled, pending final approval. Discovery concluded many months ago. This court held a preliminary approval hearing on December 4, 2013. At that hearing the Court expressed concerns over certain aspects of the settlement and the parties revised the agreement and notice documents in keeping with the court's concerns. On February 6, 2014, this Court granted preliminary approval of the settlement. (Dkt. 82) A final approval hearing is scheduled for July 9, 2014.

Class member Dawn Weaver is an unnamed class member who responded to the invitation contained in the class notice and filed objections to the proposed settlement. (Dkt. 98) In retaliation and without notice or any attempt to meet and confer, class counsel served a deposition subpoena on Ms. Weaver. A copy of Class Counsel's subpoena is attached to the Declaration of Darrell Palmer. Class counsel have offered no reasons why her deposition might benefit the Court during the final approval process.

The deposition subpoena is improper for several reasons. First, Class Counsel must obtain permission from the Court prior to taking discovery from an unnamed class member. They did not. Second, the discovery sought is plainly irrelevant to the case, since it has already settled. Fed. Rules Civ. Proc. 26(b)(1) requires discovery must be relevant to a party's claims or defenses. Any discovery sought after a case settles cannot possibly be relevant to claims or defenses. Third, we can assume the discovery was served after the discovery cut-off, again, since the case has settled. Class counsel can offer no proof to justify this discovery. This notice is oppressive and malicious, designed only to defy congressional mandate and deter class objectors from improving the value of the settlement for the class as a whole.

### **II. LEAVE OF COURT IS REQUIRED BEFORE DEPOSING AN UNNAMED CLASS MEMBER**

Ms. Weaver is an unnamed class member who objected to the proposed settlement. After she filed her objection, Class Counsel noticed her deposition. Serving a deposition

1 subpoena at this stage is procedurally improper and a clear abuse of process because  
 2 Class Counsel did not obtain permission for this discovery from the Court:

3       The Court is clear to the view that discovery proceedings, such as the  
 4       proposed interrogatories, are improper, directed as they are to  
 5       members of the class who are not named plaintiffs. . . . It is not  
 6       intended that member of the class should be treated as if they were  
 7       parties plaintiff, subject to the normal discovery procedures, because  
 8       if that were permitted, then the reason for the rule would fail. . . .  
 Interrogatories addressed to members of the class should not be  
 permitted.

9  
 10 *Fischer v. Wolfinbarger* (W.D.Ky. 1971) 55 F.R.D. 129, 132. This approach accords  
 with the rationale of Rule 23:

11       It would be incompatible with the rationale of Rule 23, an undue  
 12       burden upon the members of the class, unnecessary, and unjustifiably  
 13       dilatory to permit the proposed interrogatories at this stage of the case.  
 14       . . . Interrogatories submitted to the class [should] be authorized only  
 15       upon a strong showing of necessity or at least of likely material aid in  
 the resolution of common issues. This is not such a case.

16  
 17 *Gardner v. Awards Marketing Corp.* (D.Utah 1972) 55 F.R.D. 460, 462-63. The court in  
 18 *Clark v. Universal Builders* (7<sup>th</sup> Cir. 1973) 501 F.2d 324, agreed that a strong showing of  
 19 necessity must be made before allowing discovery from unnamed class members:

20       In appropriate circumstances absent class members may be  
 21       propounded written interrogatories on a showing that the information  
 22       requested is necessary to trial preparation and that the interrogatory is  
 23       not designed as a tactic to take undue advantage of the class members  
 24       or as a stratagem to reduce the number of claimants. **The party  
 seeking discovery has the burden of demonstrating its merits.**

25 *Clark*, 501 F.2d at 340 (emphasis added). In the present case, there is no trial  
 26 preparation, since the case has settled. The deposition can therefore not be “necessary to  
 27 trial preparation.” Nor has there been any showing of the possible merits of the proposed  
 28 discovery; to the contrary, the timing of the subpoena suggests it is intended to intimidate

1 a legitimate class objector, or “reduce the number of claimants.” The Ninth Circuit has  
2 also adopted this approach: “A defendant does not have unlimited rights to discovery  
3 against unnamed class members; the suit remains a representative one. . . . The district  
4 judge may reasonably control discovery to keep the suit within manageable bounds, and  
5 to prevent fruitless fishing expeditions with little promise of success.” *Blackie v. Barrack*  
6 (9<sup>th</sup> Cir. 1975) 524 F.2d 891, 906 n.22.

7 Demanding discovery of an absent class member is particularly egregious in light  
8 of the fact that Class Counsel purport to represent absent class members. Thus the  
9 discovery is aimed not at a distant a third party; rather, Class Counsel is seeking  
10 discovery from their own client, a class member. The only “success” they might achieve  
11 here would be to scare off an objector, a result flatly incompatible with the purpose of  
12 Rule 23. In fact, courts do not distinguish between plaintiffs’ counsel and defense  
13 counsel when insisting on a showing of need: *See, e.g., In re Carbon Dioxide Industry*  
14 *Anti-Trust Litigation* (M.D.Fl. 1993) 155 F.R.D. 209, 212 (“Absent a showing of such  
15 particularized need, the Court will not permit general discovery from passive class  
16 members. . . . The Court has determined, above, that non-representative class members  
17 **shall not be subject to discovery** absent a showing of a particularized need for  
18 information that cannot be obtained from class representatives.”) (emphasis added).

19 The Ninth Circuit’s recent decision in *Laguna v. Coverall*, 12-55479, 2014 WL  
20 2465049 (9th Cir. June 3, 2014) is not relevant here. In that case the court approved a  
21 settlement which by its terms required objectors be available for depositions. *Laguna*, at  
22 \*6 (“The district court also did not abuse its discretion in approving the settlement term  
23 that objectors be available for depositions.”) As such, arguably the parties had already  
24 sought leave of court to conduct discovery on unnamed class members. The Ninth  
25 Circuit’s opinion focused on the overall fairness of the proposed settlement; a motion to  
26 quash a deposition subpoena served without leave of court was not under consideration.  
27 The Ninth Circuit found the district court did not abuse its discretion in approving the  
28 settlement based on the totality of the circumstances. *Id.* (“The district court considered

1 the totality of the circumstances when it concluded that a deposition of Singh was  
 2 appropriate.”) *Laguna* can thus be distinguished because the settlement agreement in that  
 3 case required objectors be available for depositions; that is not the case here.

4 It is plain from a review of the subpoena that no showing of relevance or need has  
 5 been made; in fact, such showing should be made to the Court prior to demanding  
 6 discovery from unnamed class members. Because this showing was not made, and leave  
 7 of court was not granted prior to issuance of the subpoena, the subpoena is invalid and  
 8 must be quashed.

### 9 **III. THE DEPOSITION SUBPOENA IS INVALID BECAUSE IT SEEKS** 10 **IRRELEVANT MATERIAL**

11 Rule 26 provides, “Unless otherwise limited by court order, the scope of discovery  
 12 is as follows: Parties may obtain discovery regarding any non-privileged matter that is  
 13 relevant to any party's claim or defense...” F.R.C.P. 26(b)(1). Subject to final approval,  
 14 this case is settled. Accordingly, no information from an unnamed class member can be  
 15 relevant to claims made in the complaint.

16 Class Counsel doesn’t seek information relevant to any party’s claims or defenses.  
 17 Included within Class Counsel’s subpoena was a request for the production of  
 18 documents. Each of the seven requests is unreasonable, irrelevant, unduly burdensome  
 19 and seeks privileged attorney client communications and attorney work product.

20 For example, the first, second and third document requests seek:

21 1. All documents reflecting or memorializing any retainer  
 22 agreement or other agreements (including any drafts) that You have  
 23 entered into with JEFF M. BROWN, PATRICK SWEENEY,  
 24 DARRELL PALMER or any attorney regarding the TRADER JOE’S  
 LAWSUIT and/o the filing of Your OBJECTION.

25 2. All documents reflecting or memorializing any retainer  
 26 agreement or other agreements (including any drafts) that You have  
 27 entered into with JEFF M. BROWN, PATRICK SWEENEY,  
 28 DARRELL PALMER or any attorney regarding any other legal

1 matter, including but not limited to the filing of an objection to any  
2 class action lawsuit settlement.

3 3. All Documents related to the TRADER JOE'S LAWSUIT,  
4 including, but not limited to, Your OBJECTION and any drafts  
5 thereof, any claim submitted by You or on Your behalf, and  
6 communications between You and any other objector or anyone  
7 representing any other objector.

8 The information sought constitutes confidential and privileged communications  
9 pursuant to California Business and Professions Code §6149 and information protected  
10 by attorney client privilege and attorney work product privilege. Neither of these  
11 requests have any relation to claims or defenses in this lawsuit.

12 The other document requests seek information regarding the objector's past  
13 involvement in other unrelated lawsuits, including:

14 4. All Documents related to any class action settlement that You  
15 have filed or has been filed on Your behalf or, or that You (or Your  
16 law firm, if applicable) have filed on behalf of others.

17 5. All Documents reflecting or memorializing any change to any  
18 class action settlement that You (or Your law firm, if applicable)  
19 obtained as a result of any objection You (or Your law firm, if  
20 applicable) made.

21 6. All Documents reflecting, memorializing or relating to any  
22 relief obtained as a result of an objection You have filed to any class  
23 action settlement, including but not limited to injunctive relief or  
24 monetary damages.

25 7. All Documents reflecting, memorializing or relating to any  
26 monetary relief You have received as a result of filing an objection to  
27 any class action settlement, or provided to You (or Your law firm, if  
28 applicable) for the withdrawal, dismissal or other resolution of any  
objection to any class action settlement, or withdraw [sic] of any  
appeal from a court's ruling on any objection to a class action  
settlement, including, but not limited to, all motions, petitions and



1 court orders approving of any resolution or withdrawal of your  
2 objection. See., e.g., Fed. R. Civ. P. 23(e)(5)

3 The improper nature of these requests is highlighted when viewed within the  
4 framework of Federal Rule of Civil Procedure 26(b)(1). Any document responsive to this  
5 request would offer no support to any of the claims or defenses in this lawsuit. And if  
6 this information were related, as a practical matter they would still be irrelevant because  
7 the lawsuit has settled.

8 Service of the deposition subpoena on Ms. Weaver constitutes an abuse of  
9 discovery process to harass and intimidate this objector. If Class Counsel are permitted  
10 to subject objectors to burdensome and irrelevant inquisitions, surely the burden of  
11 complying with time consuming discovery requests will serve to deter all legitimate input  
12 and criticism.

13 **IV. THE REQUEST IS UNDULY BURDENSOME AND SEEKS PRIVILEGED**  
14 **MATERIALS**

15 Rule 45 of the Federal Rules of Civil Procedure **requires** the court to quash a  
16 subpoena that (iii) requires disclosure of privileged or other protected matter, if no  
17 exception or waiver applies; or (iv) subjects a person to undue burden. F.R.C.P.  
18 45(3)(A)(iii) and (iv.)

19 Here, the information sought falls squarely within each of these two categories. As  
20 noted, some of the document production requests seek privileged attorney client  
21 agreements. (see California Business and Professions Code §6149.) The subject matter  
22 of the remaining requests bears no relation to the merits of the underlying lawsuit.

23 Class Counsel is attempting to dissuade objectors from participating in these  
24 proceedings. Requiring a non-party objector to attend a deposition and produce  
25 documents which provide information unrelated to the claims in the lawsuit and protected  
26 by privilege would certainly allow them to achieve that goal. Considering the nature of  
27 the requests and the posture of the case, this request is unduly burdensome and promises  
28



1 no fruitful evidence toward the prosecution of Class Counsel's claim. Accordingly, this  
 2 court must quash Class Counsel's subpoena.

### 3 **V. THE REQUEST FOR DISCOVERY IS PREMATURE**

4 The final approval hearing is still pending. Here, the court will have an  
 5 opportunity to evaluate objections, and the litigants will have an opportunity to  
 6 participate and argue. Should the court determine there is a need for further development  
 7 of facts, this court may then allow discovery.

### 8 **VI. THE COURT HAS A DUTY TO PROTECT THE OBJECTION PROCESS**

9 Objectors play a vital role in the review of class action settlements. "Objectors  
 10 can encourage scrutiny of a proposed settlement and identify areas that need  
 11 improvement. They can provide important information regarding the fairness, adequacy,  
 12 and reasonableness of the settlement terms." *Pallister v. Blue Cross and Blue Shield of*  
 13 *Montana*, 285 P.3d 562, 568 (Mont. 2012). Despite the important role objectors play in  
 14 the class action process, "[C]lass action lawyers may try to fend off interlopers who  
 15 oppose a proposed settlement as insufficiently generous to the class; and given the role of  
 16 such interlopers in preventing cozy deals that favor class lawyers and defendants at the  
 17 expense of class members, their requests for fees must not be slighted." *In re Trans*  
 18 *Union Corp. Privacy Litig.*, 629 F.3d 741, 743 (7th Cir. 2011) (Posner, J.).

19 Recently, Justice Posner issued another important opinion underscoring the  
 20 important role played by objectors. In *Eubank v. Pella Corp.*, 13-2091, 2014 WL  
 21 2444388 (7th Cir. June 2, 2014), Justice Posner observed:

22 In this case, despite the presence of objectors, the district court  
 23 approved a class action settlement that is inequitable—even  
 24 scandalous. The case underscores the importance both of objectors  
 25 (for they are the appellants in this case—without them there would  
 26 have been no appellate challenge to the settlement) and of intense  
 27 judicial scrutiny of proposed class action settlements.

28 *Eubank*, at \*3.

1 The court should be mindful that discovery of absent class members is inconsistent  
 2 with Rule 23's purposes and should only rarely be permitted. *See, e.g., Cox v. American*  
 3 *Cast Iron Pipe Co.*, 784 F.2d 1546, 1556-56 (11th Cir. 1986). "Courts have allowed  
 4 discovery to be taken from unnamed class members . . . when the information requested  
 5 is relevant to the decision of common questions, the discovery is tendered in good faith  
 6 and not unduly burdensome or harassing, the discovery does not require expert, technical  
 7 or legal assistance to respond, and is not available from the representative parties."  
 8 *Boynton v. Headwaters, Inc.*, 2009 WL 3103161, No. 1-02-111-JPM-egb, at \*1 (W.D.  
 9 Tenn. Jan. 30, 2009). Courts have questioned the need for depositions when objections  
 10 are pending. For example, in *Corpac v. Rubin & Rothman, LLC*, 2012 WL 2923514, No.  
 11 10-CV-4165, at \*2 (E.D.N.Y. Jul. 18, 2012), the Court denied class counsel's request to  
 12 depose the objector, reasoning that the Federal Rules of Civil Procedure require a "strong  
 13 showing" of need to depose an absent class member, and that such a showing was absent  
 14 where the bases for the objector's objections were clear. *Cf. Trombley v. Bank of*  
 15 *America Corp.*, 2011 WL 3740488, Civ. No. 08-cv-456-JD, at \*5 (D.R.I. Aug. 24, 2011)  
 16 (declining to order depositions and discovery of objectors).

## 17 **VII. THIS COURT MUST IMPOSE SANCTIONS**

18 Rule 26 of the Federal Rules of Civil Procedure states that when an attorney signs  
 19 and verifies a request for discovery, they warrant that the request is:

- 20 (i) consistent with these rules and warranted by existing law or by  
 21 a non-frivolous argument for extending, modifying, or  
 22 reversing existing law, or for establishing new law;
- 23 (ii) not interposed for any improper purpose, such as to harass,  
 24 cause unnecessary delay, or needlessly increase the cost of  
 25 litigation; and
- 26 (iii) neither unreasonable nor unduly burdensome or expensive,  
 27 considering the needs of the case, prior discovery in the case,  
 28 the amount in controversy, and the importance of the issues at  
 stake in the action.

1 Rule 26 goes on to say, “If a certification violates this rule without substantial  
2 justification, the court... must impose an appropriate sanction on the signer, the party on  
3 whose behalf the signer was acting, or both. The sanction may include an order to pay the  
4 reasonable expenses, including attorney's fees, caused by the violation.” Rule 26(g)(3).  
5 Class Counsel was not granted permission by the court to inquire about this information –  
6 likely because their request would most certainly be denied. Their attempt is not only  
7 procedurally improper, but it is also being used for an improper purpose. Wherefore, this  
8 court must impose sanctions. This objector respectfully requests that this court grant  
9 reasonable attorneys’ fees to defend against this attempted abusive wielding of the courts  
10 power by class counsel.

### 11 **VIII. CONCLUSION**

12 In the unique setting of class action settlements, the Court becomes the fiduciary  
13 for the class. Many Courts welcome reasoned criticism of these settlements and are  
14 mindful of the important role played by objectors in improving the fairness of class action  
15 settlements. The court should protect this role by preventing discovery intended to chill  
16 class members’ right to object.

17 As such, this objector respectfully requests this court to quash the deposition  
18 subpoena. Moreover, this malfeasance warrants sanctions and the moving party requests  
19 attorneys’ fees for its forced participation in petitioning this court to stop this abuse of  
20 process.

21 LAW OFFICES OF DARRELL PALMER PC

22  
23 Dated: June 27, 2014

By: /s/ Joseph Darrell Palmer  
Joseph Darrell Palmer

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25 Attorney for Objector Dawn Weaver  
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